KUMARAGURU A/L N. MUNIANDY & 2 ORS.

v.

PUBLIC PROSECUTOR

HIGH COURT, PENANG
TUAN VINCENT NG KIM KHOAY JC
[CRIMINAL APPEAL NO. 42(52)-94-88]
25 OCTOBER 1993

EVIDENCE: Expert evidence - Whether chemist who testified on behalf of the prosecution was an expert in the analysis of heroin - Break in chain of evidence on the custody of the drug exhibits - Whether conviction defective.

CRIMINAL LAW & PROCEDURE: Accused electing to remain silent at the close of the case for the prosecution - Whether accused 'must necessarily' be convicted of the charge.

The appellants were jointly charged and convicted under s. 39B of the Dangerous Drugs Act 1952 for jointly trafficking in 361.7 grams of heroin. At the close of the case for the prosecution, in the trial Court, the appellants elected to remain silent and they were duly convicted by the learned Sessions Court Judge.

On appeal the convictions were attacked principally on the grounds that:

(i) there was insufficient proof and no evidence was led that the chemist who gave evidence on behalf of the prosecution was an expert in the analysis of heroin; and
(ii) there was a break in the chain of evidence on the custody of the drugs as no evidence was led from the investigating officer as to where and how the drugs were kept before he sent them to the chemist and where and how he kept them after they were returned.

The learned DPP while conceding that there was a serious break in the chain of evidence on the custody of the drug exhibits, submitted that the non-challenge by the defence of the chain of custody or identity of the drugs would negate the effect of this infirmity in the prosecution case.

The learned trial Judge held that by remaining silent the appellants had failed to rebut the prosecutions' case against them and applying the principle in *Munusamy v. PP* [1987] 1 MLJ 492, found that the appellants 'must necessarily' be convicted of the charge.

Held:

[1] As no evidence was led to satisfy the Court that the chemist had any experience in the analysis of drugs including heroin, the Court could not presume that he was clothed with this expertise because he was a chemist with 12 years experience. The prosecution had failed in law to provide the basis for the reception of the expert opinion of the chemist under s. 45 of the Evidence Act 1950.

[2] In view of the several binding Supreme Court decisions, it is untenable for the Court to accept a lower standard of custody of drug exhibits for cases tried in the lower Courts than in the High Court. Further, on matters concerning the identity of drug exhibits, the proof of which lay with the prosecution throughout the case, no requirement rests on the defence to register any challenge on the issue. In the event, upon the evidence, the prosecution had failed to establish the identity of the drug exhibits in the Court below.

[3] The close of the prosecution case and the close of the defence case necessarily involve two different standards of proof neither of which could be similar or dispensed with if the Court has to suspend judgment at the close of the prosecution stage. It is highly essential that this dichotomy should be consciously maintained by the Court.

[4] In respect of the essential elements of the charge, the prosecution would have to establish such irrebuttable elements upon a higher 'beyond reasonable doubt' test in order for the defence to be called.

[Appeal allowed. Conviction and sentence set aside].

Cases referred to:
PP v. Lim Lian Chen [1990] 2 CLJ 1020 ***(foll)***
Munusamy v. PP [1987] CLJ 250/[1987] 1 MLJ 492 ***(refd)***
Haw Tua Tau v. PP [1981] CLJ 37/[1981] 2 MLJ 49 ***(foll)***
PP v. Chin Yoke [1940] MLJ Rep. 37 ***(notfoll)***
Ong Kiang Kek v. PP [1970] 2 MLJ 283 ***(not foll)***
Pavone v. PP [1984] 1 MLJ 77 ***(foll)***
Ragunathan v. Public Prosecutor [1982} CLJ 25/[1982] 1 MLJ 139 ***(foll)***

Legislation referred to:
Criminal Procedure Code, ss. 180, 214(i) & (iii)
Dangerous Drugs Act 1952, s. 39B
Evidence Act 1950, s. 45
Criminal Procedure Code, s. 177C (Singapore)

For the 1st appellant - A.Suppiah; M/s. Karpal Singh & Co.
For the 2nd appellant - S.P.Annamalai; M/s. Annamalai & Co.
For the 3rd appellant - V.Sithambaram; M/s. Kumar, Sitham & Co.
For the respondent - Wong Teck Meng, DPP

JUDGMENT

Vincent Ng Kim Khoay JC:
The three appellants were jointly charged and on 26 September 1987 convicted in the Sessions Court Penang under s. 39B of the Dangerous Act 1952 ("the Act") for jointly trafficking in 361.7 grams of heroin on 16 March 1982 at Fima Supermarket car park, Burma Road, Penang. The charge under s. 39B of the Act was punishable with death or imprisonment for life and triable by the Sessions Court then.

All the three appellants were called to enter upon their defence and when they elected to remain silent and called no witnesses, they were convicted and each sentenced to imprisonment for life with 6 strokes for the 1st appellant, 2 strokes for the 2nd appellant and 8 strokes for the 3rd appellant

As I shall be dealing with the facts pertaining to the grounds of appeal that are material to my decision here, I do not propose to discuss the facts at any length. Suffice it to say that in this case, the three appellants were caught by a police ambush party when the appellants, acting jointly and with each playing a slightly different role, were in the process of supplying 3 packets containing heroin (P2, P3A & B) in a briefcase to a U.S. Drug Enforcement Agent, named Alfred Alexander (PW5) posing as a representative of an American crime syndicate at FIMA Supermarket car park, Jalan Burma on 16 March 1982 between 10.00 a.m to 10.30 a.m.

At the hearing of the appeal, Counsel abandoned the ground concerning the lack of consent by the public prosecutor to prosecute.

Before me the conviction was attacked mainly on three principle grounds namely:

(a) The evidence of PW5, 6, 7 and 8 contradicted the facts shown in P16 (sketch plan) and indeed the defence case (based on questions put to prosecution witnesses) tallies with the sketch plan (grounds 14 to 17 of the 3rd appellant's petition refers).

(b) There was insufficient proof and no evidence was led, that the Chemist, Mr. Tan Cheng Yean (PW1) was an expert in the analysis of heroin. (Ground No. 4 of the 3rd appellant's petition refers).

(c) There was a break in the chain of evidence on the custody of the drugs found in P1 as no evidence was led from ASP. Khalid bin Abu Bakar, the I.O. (PW3) as to where and how the drugs were kept before he sent them to the Chemist and where and how he kept them after they were returned - a lapse of 4 years of unexplained custody of the drugs.

(Ground No. 18 of the 3rd appellant's petition refers.)

Re Ground (a)

After carefully reading the evidence of PW5, 6, 7 and 8 and comparing it with the sketch plan (P16) I find that there were some contradictions and inconsistencies between their evidence and the details in the sketch plan (P16). The DPP Encik Wong Teck Meng submitted that the relevant inconsistent details appearing in P16 were heresay evidence. This contention is untenable as the sketch plan was prepared soon after the alleged offence and the raiding officer (PW6) who gave the information for the drawing-up of P16 also gave evidence at the trial. However, I hold that there were other sufficient and overwhelming evidence adduced by the prosecution which point to the guilt of the accused persons when such evidence is considered in its entirety. In any event by opting to remain silent when the defence was called much of the material evidence against them remained unrebutted and upon re-evaluation, proved beyond reasonable doubt. This ground therefore fails.

The appellants are however on firmer ground so far as the other two grounds are concerned.

Re Ground (b)

The Chemist (PW1) had testified as follows:

> I have been working at the Chemistry Department for 12 years. I am a qualified Chemist. I have given evidence in Court before and my evidence has been accepted by Court.

Though his 12 years experience at the Chemistry Department may be sufficient for general analysis purposes yet, as no evidence was led to satisfy the Court that he had any experience in

the analysis of drugs including heroin the Court cannot presume that he was clothed with this expertise because he was a chemist with 12 years experience. This being so and upon the principles enunciated in *PP v. Lim Lian Chen* [1990] 2 CLJ 1020 which, with respect I agree, I hold that the prosecution had failed in law to provide the basis for the reception of the expert opinion of PW1 under s. 45 of the Evidence Act 1950.

Re Ground (c)

On the manner in which the drug exhibits were handled the I.O. (PW3) had this to say:

> After taking possession of these exhibits I caused photos to be taken of the exhibits by PW2. (P4 A - F identified as the photos taken on PW2's instruction).
>
> On the same day I packed P1, 2 & 3 in envelope. I marked E1 and E2 respectively. I put up a form to identify these packets. I now produce the same chemist form (Chemist form marked P13). On 17 March I went to the Chemist Department with these packets and handed them to the Chemist. She was Cik Tan. (PW1 referred). She examined the packets that day and returned them to me sealed by Chemistry Department.
>
> On 29 March 1982 at 10.30 a.m. I received the Chemist report ...

In the face of such recorded evidence and to his credit the learned DPP Encik Wong Teck Meng had acknowledge as follows, to quote:

> I concede I.O. did not say how the exhibits were kept. But see p. 48 at A. He said packed but he did not say sealed. He sent to the chemist on the following day. For one day what he did was not accounted for besides packing. From time he received from chemist and brought to court was also not accounted for.

He however countered by submitting to the Court as follows:

> In this case the chain of custody or identity of drugs were not challenged. The basic ingredients of the prosecution case must be considered proved if unchallenged i.e. the identity of the drugs.

As the learned DPP had conceded what in effect amounted to a serious break in the chain of evidence on the custody of the drug exhibits, the only issue the Court would have to consider is whether the said non-challenge by the defence would negate the effect of this infirmity in the prosecution case.

I am mindful that this case was tried in the lower Court over 10 years ago when, until the onset of several Supreme Court decisions in recent years, the standard of care and custody required in the handling of drug exhibits was not as strict as thereafter. This would explain the unsatisfactory manner in which the drug exhibits in this case were kept and the fact that this issue was not challenged by the defence.

However, in view of the several binding Supreme Court decisions and a plethora of High Court authorities on this score, it is untenable for this Court to accept a lower standard of custody of drug exhibits for cases tried in the lower Courts than in the High Court. It is also settled law that on matters concerning the identity of drug exhibits the proof of which (on the beyond-reasonable-doubt basis) lay with the prosecution throughout the case, no requirement rests on the defence to register any challenge on the issue. And as there is no need for the defence to do so, I hold that in this case and upon the evidence, the prosecution has failed to establish the identity of the drug exhibits in the Court below.

There is however another feature of this case which calls for some dissertation by this Court.

In his grounds of judgment, the learned Judge of the Sessions Court Pulau Pinang had expressed his mind as follows:

> Having been satisfied that a *prima facie* case had been established against all the 3 accused on the charge, I called them to enter upon their defence. They all chose to remain silent presumably on advice of Counsel.
>
> By electing to remain silent and calling no evidence the accused put themselves at a serious disadvantage. They thus failed to rebut the prosecution's case against them and the hypothetical position obtained had now turned into reality. They **must necessarily** be convicted of the charge. (See *Munusamy's* case).
> (Emphasis added)

The present appeal provides a suitable opportunity for this Court to revisit and to re-examine the comments occuring in the Supreme Court decision in *Munusamy v. PP* [1987] 1 MLJ 492 wherein it had occasion to interpret s. 180 of the Criminal Procedure Code, though by way of *obiter*. I say *obiter* as in that case the accused did not elect to remain silent but he gave evidence on oath and indeed called his wife (DW2) as his

witness. The relevant passage in the said decision is as follows:

> Thus, under s. 180 the judge must ask himself on the basis of credible evidence, a mere hypothetical question: If I were to accept the prosecution's evidence as accurate, would it establish the case against the accused beyond a reasonable doubt?. Putting it in the "*prima facie* case" form: On the assumption that the prosecution's evidence was accurate, could the accused be lawfully convicted? If the answer to either question is in the affirmative, then a case is said to have been made out which, if unrebutted, would warrant a conviction and in such a case the accused should be called upon to state his defence.

But went on to add further:

> It must necessarily follow that if the accused elected to remain silent and called no evidence the court **must convict** him since the hypothetical position obtained pursuant to s. 180 that the prosecution evidence would not and could not be rebutted, has become a reality (see *Public Prosecutor v. Man bin Abas* [1935] 1 MC 160.
> (Emphasis added)

This interpretation of s. 180 seems to have given rise to considerable doubt and difficulty especially in the lower Courts as evident from the above quoted comments of the learned Judge of the Sessions Court, Penang. The learned Judge of the Sessions Court appeared to have failed to appreciate the full import of the passage in the speech of Lord Diplock in *Haw Tua Tau v. PP* [1981] 2 MLJ 49 (which was discussed at length with approval in *Munusamy v. PP (supra)*) wherein his Lordship commented (at p. 51-E, 2nd Col.) thus:

> Section 188(1) states the conditions precedent to the right and duty of the judge of trial to call on the accused to enter on his defence. It takes the form of a double negative: if the court does not find that no case against the accused has been made out which, if unrebutted, would warrant his conviction. **For reasons that are inherent in the adversarial character of criminal trials under the common law system, it does not place upon the court a positive obligation to make up its mind at that stage of the proceedings whether the evidence adduced by the prosecution has by then already satisfied it beyond reasonable doubt that the accused is guilty.** Indeed it would run counter to the concept of what is fair trial under that system to require the court to do so. The crucial words in s. 188 (1) are the words ' if unrebutted', which make the question that the court has to ask itself a purely hypothetical one. The prosecution makes out a case against the accused by adducing evidence of primary facts. It is to such evidence that the words 'if unrebutted' refer...
> (Emphasis added)

> Whoever has the function of deciding facts on the trial of a criminal offence **should keep an open mind** about the veracity and accuracy of recollection of any individual witness, whether called for the prosecution or the defence, until after all the evidence to be tendered in the case on behalf of either side has been heard and it is possible to assess to what extent (if any) that witness's evidence has been confirmed, explained or contradicted by the evidence of other witnesses.
> (Emphasis added)

And his Lordship went on to say (at p. 52 - E 1st col.):

> On the question of accuracy of the evidence of any witness jurors would be instructed that it was their **duty to suspend judgment** until all the evidence of fact that either party wished to put before the court had been presented. Then and then only should they direct their minds to the question whether the guilt of the accused had been **proved beyond reasonable doubt.**
> (Emphasis added)

The earliest landmark authority on the issue of *prima facie* case is found in the judgment of Gordon-Smith Ag. J.A. in *PP v. Chin Yoke* [1940] MLJ Rep. 37 which laid down the "unsafe to convict" test in trial by a Judge with or without assessors. Despite the words "no evidence" in the relevant s. 214 (i) of the CPC for jury trial being slightly different from the words "if unrebutted" in s. 180 of the Code it was further held in this case that the "unsafe to convict" test applied to trial by a jury as well, due to the expression "which they could not safely convict" in s. 214 (iii) of the said Code.

The view of Gordon-Smith Ag. J.A. on what constituted *prima facie* case is expressed as follows:

> There may be good grounds for rejecting some part or all of it and therefore, it is **necessary to weigh up this evidence** and on so doing one may be satisfied that, if unrebutted, it would warrant the accused's conviction. In

such case the accused is then called upon to answer the *prima facie* case which was thus been made out against him. If, however, on the other hand, after weighing up such evidence for the prosecution one is satisfied that it would be wholly **unsafe to convict** upon such evidence standing alone, then no *prima facie* case has been made out and the accused should not be called on for his defence.
(Emphasis added)

The several logical implications of this loaded passage are:

(a) The Court, when considering whether a *prima facie* case has been made up, does not suspend judgment or ask purely hypothetical questions or keep an open mind about the veracity and accuracy of witnesses recollection but indeed has to weigh up such evidence and be satisfied as to the accused's guilt.

(b) To be satisfied, to warrant and to safely convict the accused in order to accord with our concept of a fair trial under our common law system would necessitate a standard of proof which is beyond reasonable doubt.

(c) Thus, if *PP v. Chin Yoke (supra)* is to be accepted as good law, the test to be applied at the end of the prosecution case in respect of all the essential elements for establishment of the alleged offence would be whether such elements have been **proved beyond reasonable doubt.** Indeed, this was the view of the Singapore Court of Appeal in *Ong Kiang Kek v. PP* [1970] 2 MLJ 283 which held that the trial Court is required, by s. 177 C of the (Singapore) Criminal Procedure Code, at the close of the prosecution case to determine whether or not the evidence tendered on behalf of the prosecution, if unrebutted, has established the case against the accused **beyond a reasonable doubt;** and if not so established, to acquit the accused.

The application to the prosecution's evidence of a more rigorous test of credibility before deciding to call the defence in *Ong Kiang Kek (supra)* was fully discussed and unanimously over-ruled, in no uncertain terms, by their Lordships in the Privy Council decision in *Haw Tua Tau (supra)* in the following passage in the speech of Lord Diplock:

> Although s. 188 (1) first became law in 1960 and so forms no part of the amendments made by Act No.10 of 1976, their Lordships have dealt with its interpretation at some length because in the judgment of the Court of Criminal Appeal of Singapore in the case of *Ong Kiang Kek v. Public Prosecutor* [1970] 2 MLJ 283 there are certain passages that seem upon a literal reading, to suggest that unless at the end of the prosecution's case the evidence adduced has already satisfied the Judge beyond a reasonable doubt that the accused is guilty, the judge must order his acquittal. But this can hardly have been what that Court intended, for it ignores the presence in the section of the crucial words "if unrebutted", to which in other passages the court refers, and **it converts the hypothetical question of law which the judge has to ask himself at that stage of the proceeding:** "If I were to accept the prosecution's evidence as accurate would it establish the case against the accused **beyond a reasonable doubt?**" **into an actual and quite different question of fact:** "**Has the prosecution's evidence already done so?**" For the reasons already discussed their Lordships consider this to be an incorrect statement of the effect of s. 188(1).
> (Emphasis added)

It goes without saying that if *Chin Yoke and Ong Kiang Kek (supra)* are accepted as valid law then, an accused who remained silent and called no witnesses when his defence is called, must necessarily be convicted as enjoined in *Munusamy v. PP (supra)* and the automatic conviction of the accused in such a situation would indeed turn into reality. However, in the light of *Haw Tua Tau (supra)* this is not the law currently accepted by the Courts.

Perhaps, the serious rhetorical question which may have confronted the Privy Council when deciding *Haw Tua Tau* was the same question which an analytical logician may ask: namely that if, upon application of the strict test, the prosecution has proved its case beyond reasonable doubt at the close of the prosecution, then what is there left for the defence to rebut if defence is called - unless we overcome this intellectual objection by embarking upon a further exercise in semantics.

It is clear, from a careful reading of these passages from Lord Diplock's speech that in deciding whether to call for the defence the Court has merely to apply a *prima facie* test by asking purely hypothetical questions, whereas in order to convict the accused after the close of

defence, the Court would have to hold that the case has been proved beyond reasonable doubt. The material exhortation in that speech is that it is the Court's duty to suspend judgment until the defence case had closed. The defence case closes as soon as it chooses to close its case whether or not the accused gives evidence in the witness stand and whether or not it calls any witnesses to give evidence on its behalf. The test to be applied therefore, even assuming that the accused remained silent and called no witnesses, would be of a higher standard of proof after the defence had closed it's case and this would be proof beyond reasonable doubt. And, it was Edgar Joseph Jr. J. (as he then was) who in *Pavone v. PP* [1984] 1 MLJ 77 emphasized the importance of the Court not to adopt the confused or muddled approach should the defence elect to remain silent and calls no evidence. This is how he put it:

> Now, the sole question at the close of the case for the prosecution is whether or not a *prima facie* case has been made out, that is to say, whether there is some evidence (not inherently incredible), which, if believed, establishes the essential elements of the offence charged. If there is such evidence, then the defence must be called but care must be taken to leave suspended the question of the varacity and accuracy of recollection of witnesses until after the close of the case for the defence. **This applies even where, as here, the defence elects to remain silent** and calls no evidence. Consequently, in a proper case, there is nothing illegal in a Magistrate or a President, or a Judge sitting alone or with Assessors, calling for the defence upon *prima facie* evidence being adduced and then proceeding to acquit and discharge even when the accused elects to remain silent and to call no evidence if not satisfied that the charge has been established by the prosecution **beyond all reasonable doubt.**
> (Emphasis added)

Unfortunately, in the teeth of the above *dictum*, the learned Judge of the Sessions Court, Pulau Pinang (the authority was indeed cited to him) had held (at p. 123 of the Appeal Book), to quote:

> The Court was bound by the decision of the Supreme Court in *Munusamy v. PP*, as opposed to *Pavone v. PP*, in that the accused must be convicted when they chose to remain silent.

Thus, in the face of such naked misdirection on the law by the learned Sessions Court Judge, it became incumbent on this Court - nay, on this score alone - in the interest of justice, to re-examine the evidence led by the prosecution and to arrive at a fair and just decision.

The close of the prosecution case and the close of the defence case necessarily involve two very different stages of the trial and upon the principles enunciated in *Haw Tua Tau (supra)* - approved and applied in the Federal Court decision of *Ragunathan v. Public Prosecutor* [1982] 1 MLJ 139 - also necessarily involve two different standards of proof, neither of which could be similar or dispensed with if the Court has to suspend judgment at the close of the prosecution stage. It is highly essential that this dichotomy in the two entirely distinct stages, which in turn necessitates two vitally different standards of proof should be consciously maintained by the Court at both the stages. Logically, the rationale employed in deciding to call the accused to enter upon his defence, which is based on asking certain hypothetical questions, could not be the same rationale for the conviction of the accused, in our system of justice which permits one and only one standard of proof for a conviction; and that is that each and every essential element of the offence has to be proved beyond reasonable doubt.

Even then, it is this Court's view that the expression "if unrebutted" would seem to confine the application of the lower "*prima facie*" test at the close of the prosecution case, to only the rebuttable (essential) elements of the charge. Whereas, in respect of certain essential elements of the charge which are not of the rebuttable type e.g. the identity of the offending exhibits, the prosecution would have to establish such irrebuttable elements upon a higher beyond-reasonable-doubt test in order for the defence to be called.

After careful consideration and upon the Grounds (b) and (c) above, I would allow the appeal of the three appellants here and set aside the conviction and sentence of the learned Judge of the Sessions Court, and I so order.